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No. 91-237

Supreme Court, U.S.

FILED

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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

IN RE: CONDEMNATION BY COMMONWEALTH
OF PENNSYLVANIA, PUBLIC UTILITY
COMMISSION OF RIGHT-OF-WAY FOR
LEGISLATIVE ROUTE 1058, SECTION A04,
A LIMITED ACCESS HIGHWAY IN SOUTH
UNION TOWNSHIP,

ANDREW BARRON and HELEN BARRON and
FRANK HORVATH and ANNA HORVATH,

Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

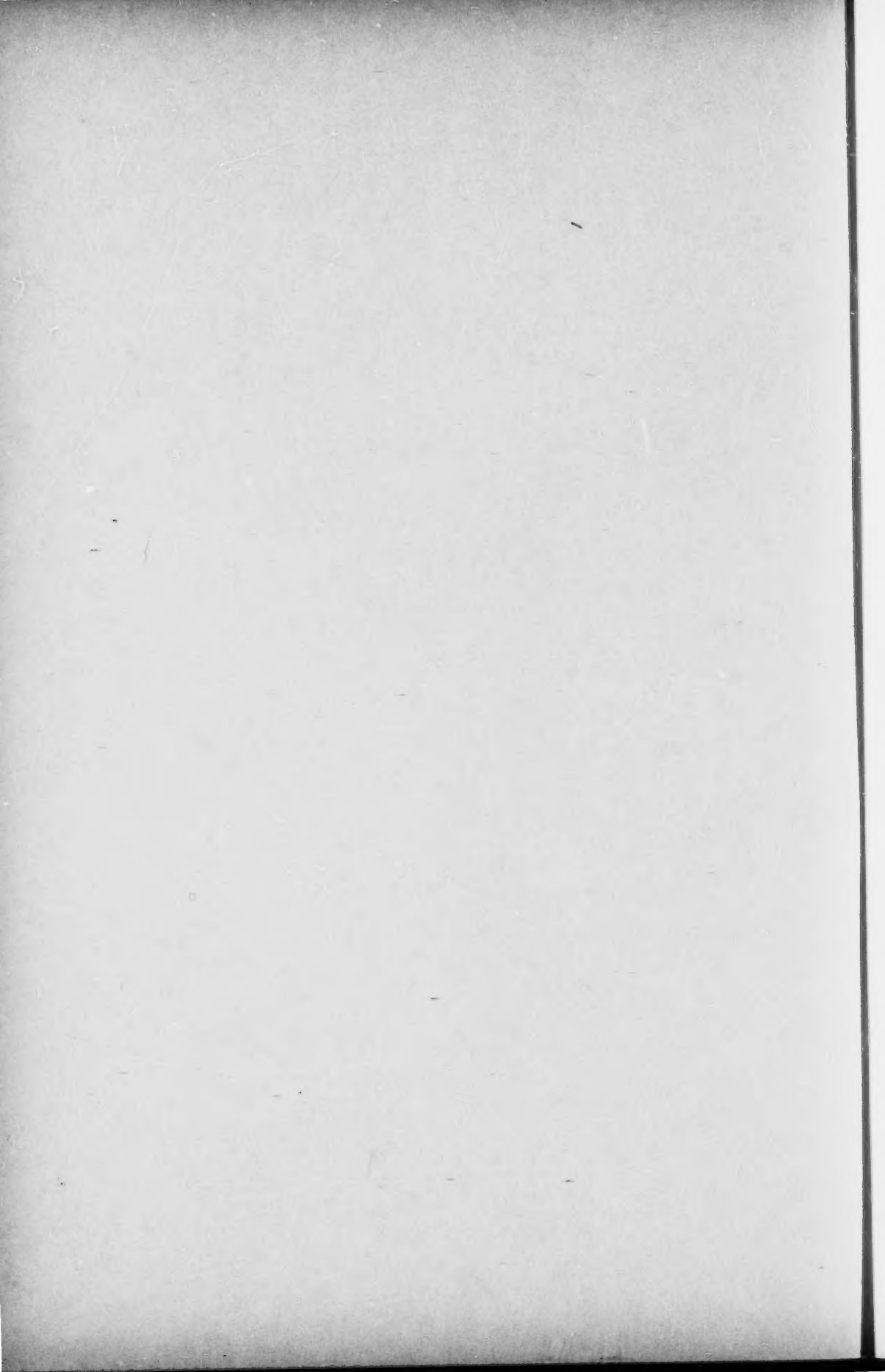
Respondent

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED

ARE CONDEMNEDS BARRED BY THE
STATUTE OF LIMITATIONS FROM SEEKING
ADDITIONAL COMPENSATION FROM THE
DEPARTMENT BECAUSE CONDEMNEDS
NEGLECTED TO FILE THEIR PETITIONS
IN THE STATUTORILY MANDATED FORUM
IN A TIMELY FASHION.

(Answered in the affirmative by
Pennsylvania's court of last resort,
the Pennsylvania Supreme Court.)

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REASONS WHY PETITION FOR WRIT
OF CERTIORARI SHOULD BE DENIED

The instant case does not involve issues of national significance nor will its resolution by this Court impact upon individuals other than the instant condemnees.

This is a case involving the express statutory delegation of eminent domain powers by the Pennsylvania Legislature to the Pennsylvania Public Utility Commission. Condemnees are seeking this writ of certiorari because they failed to follow the statutorily prescribed procedure for challenging the Department's determination of damages. Further action by condemnees is now precluded by Pennsylvania's six year statute of limitations. Condemnees were, however, paid estimated just compensation for the condemned property by the Department. Consequently, this case does not involve the taking of private lands without the payment of compensation.

Condemnees also suggest that this case is of national significance because it raises the issue of an administrative agency's power to promulgate regulations and thereafter interpret those same regulations. No such issue is presented. Condemnees have never challenged any regulation or any agency's authority to promulgate or interpret any regulation during the course of this case. Condemnees merely disagree with the statutory scheme duly enacted by Pennsylvania legislature.

Finally, this Court should not grant condemnees a writ of certiorari because the constitutional arguments now advanced by condemnees were not properly preserved in the trial court. In the trial court condemnees asserted that the statutory scheme of Section 2704 violated Article I, Section I, of the Pennsylvania Constitution as well as unnamed provisions of the United States

Constitution. While condemnees did assert that the statutory provision in question was "impermissibly vague", they confused vagueness with their dissatisfaction over the procedure chosen by our legislature.

For the foregoing reasons condemnees' petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

On or about April 8, 1974 the Pennsylvania Public Utility Commission, an administrative tribunal (hereinafter "Commission"), pursuant to 66 Pa. C.S. §2702, condemned, on behalf of the Commonwealth of Pennsylvania, Department of Transportation (hereinafter "Department"), property owned by Andrew and Helen Barron and Frank and Anna Horvath (hereinafter "condemnees"). The condemnation was necessary in order to relocate a portion of State Highway Route

1058. This relocation necessitated the construction and/or reconstruction of certain rail-highway crossings. The Commission's order evidencing this appropriation, at docket number A-97492, was signed on March 26, 1974, and filed shortly thereafter.

On or about June 4, 1974, the Department paid condemnees estimated just compensation for the acquired property. Condemnees, dissatisfied with these amounts, filed petitions for the appointment of viewers with the Common Pleas Court of Fayette County, a trial court, in 1979. These petitions were filed with the common pleas court notwithstanding the statutory mandates of 66 Pa. C.S. §2704, 26 P.S. §1-303, and the Department's notice to condemnees' counsel that the Commission must divest itself of jurisdiction prior to condemnees proceeding to the common pleas court. Upon receiving these

petitions the Honorable Fred Adams appointed two separate boards of viewers.

Due to the opposition voiced by condemnees' counsel, hearings were not scheduled before the appointed boards of viewers. In July of 1986, condemnees finally petitioned the Commission to transfer, and thus divest itself of, jurisdiction over their claims. The Department filed an objection to the transfer raising, inter alia, the statute of limitations as a bar to further recovery. The Commission then issued an order divesting itself of jurisdiction. Said order was issued without prejudice to the Department to present its objections to the court of common pleas.

Upon discovering that the Commission had transferred the claims, the Department filed a motion with the Court of Common Pleas of Fayette County asking that court to dismiss the condemnees' petitions for the appointment of viewers. On

March 23, 1987, the trial court granted the Department's motion and dismissed both petitions relying upon the Pennsylvania Commonwealth Court's decision of the previous year in Huss v. Pennsylvania Department of Transportation, 99 Pa. Commonwealth Ct. 386, 512 A.2d 1356 (1986), appeal dismissed as having been improvidently granted 515 Pa. 134, 544 A.2d 446 (1988).

Upon receiving the trial court's decision, condemnees filed a timely appeal to the Commonwealth Court, an intermediate appellate court. That court, by a 2 to 1 decision, reversed the decision of the trial court. Barron v. Pennsylvania Department of Transportation, 124 Pa. Commonwealth Ct. 399, 557 A.2d 1109 (1988). Thereafter the Department sought, and was granted, allowance of appeal by the Pennsylvania Supreme Court, the state court of last resort. On March 21, 1991, the

Pennsylvania Supreme Court reversed the decision of the Commonwealth Court, citing Huss, supra.

Condemnees have raised issues of fact, evidence and law that were not raised in the trial court of Pennsylvania. "It is black letter law that an appellate court cannot consider anything which is not a part of the record in the case." Commonwealth v. Young, 456 Pa. 102, 110, 317 A.2d 258, 264 (1974). Condemnees' suggestion that the board of view did not need to be convened because the property was not physically taken until 1985 when construction resumed, is a misstatement of law and an alleged fact which is de hors the record. The Commission formally acquired the ~~property~~ in question on or about March 26, 1974, when the declaration of taking was filed. If possession has occurred, evidence thereof is de hors the record.

Condemnees' assertion that they were notified in May of 1985, that the highway project was to be resumed is also de hors the record. The "lodgings" filed by condemnees with this Court which consist of copies of the condemnees' applications for just compensation were brought to the attention of the Pennsylvania Supreme Court for the first time in condemnees' application for reargument. Accordingly, these lodgings are also de hors the record.

Condemnees are also raising legal issues for the first time before this Court. Not once during the history of this case have condemnees challenged any regulation of this Commonwealth. Specifically, condemnees have never asserted that the Commission improperly promulgated and/or interpreted any regulation. While condemnees did assert in the trial court that 2704(b) of the

Public Utility Code was "impermissibly vague", condemnees submitted that the statute violated only Article I, Section 1 of the Pennsylvania Constitution, as well as unnamed provisions of the United States Constitution.

SUMMARY OF THE ARGUMENT

Condemnees failed to preserve in the trial court arguments now advanced in this Court, namely, that Section 2704 of the Public Utility Code violates Articles V and XIV of the United States Constitution, as well as Article I, §10 of the Pennsylvania Constitution. Assuming, arguendo, that condemnees properly raised the constitutional issues now advanced, Section 2704 complies with the constitutional mandates of due process by providing condemnees with the opportunity to be heard at a meaningful time, in a

meaningful manner. Selection of the hearing process is a matter for the Pennsylvania legislature, not condemnees. Condemnees' suggestion that 2704 is impermissably vague is also without merit as the statute clearly sets forth the requirement that a party must file an application with the Commission in order to effectuate a transfer of jurisdiction to the court of common pleas.

Finally, this is not a case of national significance warranting the grant of a writ of certiorari by this Court. It is merely a case where condemnees neglected to file their petitions for the appointment of viewers in the statutorily mandated forum within the time limits prescribed by the Pennsylvania legislature.

ARGUMENT

Condemnees have failed to properly preserve their argument that Section 2704 of the Public Utility Code violates Articles V and XIV of the Constitution of the United States. In the trial court condemnees merely argued that Section 2704(b) of the Public Utility Code was impermissibly vague in violation of Article I, Section 1 of the Pennsylvania Constitution and pertinent provisions of the United States Constitution. Condemnees' reference to the Constitution of the United States was nebulous and undefined. Condemnees are now attempting to characterize the issues presented in this case as violations of the Due Process Clause as set forth in Articles V and XIV of the United States Constitution. This maneuver is precluded by condemnees' failure to preserve these issues in the

trial court. In addition to their failure to preserve the Federal Constitutional issues, condemnees failed to assert in the trial court that Section 2704 violated Article I, Section 10 of the Pennsylvania Constitution. Therefore, condemnees have also waived their right to raise this issue in this Court.

Assuming, arguendo, that condemnees' properly preserved the constitutional issues now raised in their application for writ of certiorari, their claims are meritless. "The power of Eminent Domain is inherently vested in a sovereign state; and the procedure for exercising this power is a matter for state regulation." City of Little Rock v. Raines, 241 Ark. 1071, 1078, 411 S.W.2d. 486, 490-491; City of Little Rock v. Sawyer, 228 Ark. 516, 527, 309 S.W.2d. 30, 36 (1958). It is well settled that a state legislature may delegate its condemnation powers to

a subordinate agency with the caveat that the delegation of such powers must be indicated by express terms or by clear implication. Washington Metropolitan Area Transit Authority v. One Parcel of Land in Montgomery County, Md., 706 F.2d 1312 (4th Cir.), cert. denied 464 U.S. 893, 104 S. Ct. 238 (1983); Jacobson v. Tahoe Regional Planning Agency, 436 U.S. 943, 98 S. Ct. 2843, 56 L.Ed.2d 784, affirmed in part, reversed in part 440 U.S. 391, 99 S. Ct. 1171, 59 L.Ed.2d 401 (1979). In 1964, the Pennsylvania legislature enacted the Pennsylvania Eminent Domain Code (hereinafter "Code"). Section §1-303 of the Code reads as follows:

§1-303. Intent of the Act; Exclusions. It is intended by this act to provide a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages therefore, except as provided in §901; provided, however,

that nothing in this act shall be deemed to affect, vary, alter or modify the jurisdiction or power of the Public Utility Commission of the Commonwealth of Pennsylvania, the State Mining Commission created under the act of June 1, 1933 (P.L. 1409), as reenacted and amended, or any act providing for the assessment of benefits for public improvements on the properties benefited. This act is not intended to enlarge or diminish the power of condemnation given by law to any condemnor.

26 P.S. §1-303¹ (emphasis added).

Section 1-303 of the Code was intended by the legislature to provide an exclusive procedure for determining damages in matters of eminent domain with certain, clearly defined, exceptions. The powers and jurisdiction of the Commission are exclusions which were clearly and specifically carved out by the legislature. Nothing in the Code shall be deemed to "affect, vary, alter, or modify the jurisdiction or powers of

¹Act of June 22, 1964, Special Session., P.L. 84, as amended.

the Commission." 26 P.S. §1-303.

(emphasis added).

The Pennsylvania legislature set forth, with equal clarity, the jurisdiction and power of the Commission in condemnations involving rail-highway crossings². Since 1913 the Commission has possessed the exclusive power, in the first instance, to determine damages where the Commission condemns property on behalf of the Department³.

Condemnees "commenced" their actions against the Department on June 14, 1979. Therefore, section 2704

²Condemnees have never challenged the Commission's power to condemn property such as here concerned. 26 Pa. C.S.A. §2702.

³Since its enactment in 1913 this statute has been amended three times. Act of July 26, 1913, P.L. §1374 creating the Public Service Commission; Act of May 28, 1937, P.L. 1053, as amended, 66 P.S. §1101 et seq., act of July 3, 1963, P.L. 212, §1; Act of July 1, 1978, P.L. 598, No. 116 §1.

of the Public Utility Code, as amended in 1978, is applicable to the case at bar. The statute reads in relevant part:

§2704 Compensation for damages occasioned by construction, relocation or abolition of crossings.

(a) General rule.--The compensation for damages which the relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the commission...

(b) Judicial review.--

...The commission may, of its own motion, or upon application of any party in interest, submit to the court of common pleas...the determination of the amount of damages...

66 Pa. C.S.A. §2704⁴ (emphasis added).

A clear reading of Section 1-303 of the Eminent Domain Code and Section 2704 of the Public Utility Code shows that the legislature intended the jurisdiction of a common pleas court to determine damages to be derivative;

⁴Act of July 1, 1978, P.L. 598, No. 116
§ 1.

dependent solely upon a transfer of jurisdiction by the Commission. Huss, supra. Thus, the petitions filed by the condemnees in the court of common pleas were void ab initio. Id. at 388, 512 A.2d at 1358 (1986).

While it is true that the Department did not file preliminary objections to the petitions for appointment of viewers, both state and federal law are well-settled; objections to subject-matter jurisdiction can be raised at any time. Lake County Estates Inc., v. Tahoe Regional Planning Authority, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed.2d 401 (1979); Fowler v. Eddy, 110 Pa. 117, 1 A. 789 (1885); Edemiller Inc. v. Department of Highways and State Highway and Bridge Authority, 408 Pa. 195, 182 A.2d 911 (1962); Brenner v. Sukenick, 410 Pa. 324, 189 A.2d 246 (1963).

Once the claims were actually transferred by the Commission in August of 1985 the six year statute of limitations barred condemnees from seeking further recovery⁵. Statutes of limitation are applicable to Fifth Amendment taking claims. Loesch v. United States, 645 F.2d 905 (Ct. Cl. 1981), cert. denied 454 U.S. 1099, 102 Ct. 672, citing Soriano v. United States, 352 U.S. 270, 77 S. Ct. 269, 1 L. Ed.2d 306 (1957); Snadler Manufacturing v. United States, 164 F. Supp. 249, 143 Ct. Cl. 92 (1958). In discussing the public policy behind statutes of limitation the Pennsylvania Supreme Court has stated:

The defense of the statute of limitations is not a technical

⁵The applicable six year statute of limitations in effect at the time that this action was "commenced" was found at 42 Pa. C.S.A §5527(4). The statute of limitations is currently five years and it is found at 42 Pa. C.S.A. §5526(4).

defense but substantial and meritorious.*** 'Statutes of limitation are vital to the welfare of society and are favored in the law. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence.

Schmucker v. Naugle, 426 Pa. 203, 231, A.2d 121, 123 (1967) (emphasis added).

Condemnees suggest that they were unconstitutionally deprived of due process because the Pennsylvania legislature neglected to provide them with direct access to the court of common pleas. Due process does not mandate that a party receive a judicial hearing. Doe v. Gallinot, 486 F. Supp. 983 (C.D. Cal. 1979), aff'd 657 F.2d 1017 (9th Cir. 1979). There is no one correct form of procedure which must be used to satisfy the requirements of due process. Kremer v. Chemical Const. Corp, 456 U.S. 461, 102 S. Ct. 1883, 72 L.Ed.2d 262, rehearing denied 458 U.S.

1133, 103 S. Ct. 20, 73 L.Ed.2d 1405 (1982). Speaking for the majority in the case of Mitchel v. W.T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L.Ed.2d 406 (1974), Mr. Justice White reiterated what due process does not require:

The requirements of due process of law "are not technical, nor is any particular form of procedure necessary." (citation omitted). Due process of law guarantees "no particular form of procedure; it protects substantial rights." (citation omitted). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." (citations omitted).

Id. at 610, 94 S. Ct. at 1901, 40 L.Ed.2d at 415.

In determining whether Pennsylvania's legislative scheme for determining damages passes constitutional muster, legal precedent requires consideration of three factors. This Court stated in Mathews v. Eldrich, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976):

Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors; First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. (citations omitted).

Id. at 336, 96 S. Ct. at 903, 47 L.Ed.2d at 33. Due process only requires that one be given the opportunity to be heard at a meaningful time, in a meaningful manner, not direct access to a court rather than an administrative tribunal. Mathews, supra. Condemnees have challenged the statutory scheme enacted by the legislature without so much as setting forth the standard for reviewing these statutes much less providing this

Court with an analysis of the alleged constitutional deficiencies.

The Department readily concedes that the acquisition of private property pursuant to the powers of eminent domain impacted upon a fundamental property interest of these condemnees. Gaballah v. Johnson, 629 F.2d 1191 (7th Cir. 1980). However, the procedures established in 2704 of the Public Utility Code clearly define the steps that must be taken before additional damages may be ascertained. Condemnees concede that they have been paid compensation for the condemned premises. Therefore, this case does not present the issue of a taking without compensation.

Section 2704 plainly states that any party may seek to have the Commission divest itself of jurisdiction by filing with the Commission an application. A copy of the application and instructions

for its use as promulgated by the Commission, can be found at 52 Pa. Code §3.363(Form F) and §3.551(6) respectively. It is clear from the record in this case that the Commission transferred the instant matter once it was requested to do so without condemnees utilizing the Commission's official application form. The Commission's regulations had nothing whatsoever to do with condemnees' failure to properly perfect their appeals.

Aside from the fact that condemnees' counsel was charged with ascertaining the law governing this condemnation it must be noted that the Department provided condemnees' counsel with an interagency memorandum outlining the proper procedure to be followed in the instant case. Specifically, condemnees' counsel was made aware that the Commission must divest itself of

jurisdiction prior to condemnees filing their petition for the appointment of viewers in the court of common pleas. The docket number contained on condemnees' petitions for the appointment of viewers referenced the Commission. Moreover, the requests for relief contained in these petitions referenced the Public Utility Code as authority for the relief requested; not the Eminent Domain Code.

In addition to challenging the propriety of Section 2704, Condemnees suggest that the statute is vague because it fails to provide a procedure for property owners to apply directly to the court of common pleas. A statute is not vague merely because it fails to provide for direct access to a given forum. Rather, a statute is unconstitutionally vague "when men of common intelligence must necessarily guess as to its meaning and differ as to its application." Hamm

v. Yeatts, 479 F. Supp. 267 (W.D. Va. 1979). The instructions set forth in Section 2704 clearly articulate that the interested party must file an application with the Commission for a transfer to take place.

Finally, condemnees concede that, theoretically, administrative agencies possess the power to formulate policies in order to implement statutorily-created programs. Chevron USA v. National Resources Defense Counsel, Inc., et al., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). This concession is benign in view of the fact that no administrative policy or regulation is at issue in this case.

Condemnees cite Chevron, supra., presumably for the proposition that while administrative agencies are authorized to promulgate regulations to implement statutorily mandated programs, these agencies should not be empowered

to interpret their own creations.

Condemnees' analysis never goes beyond the stating of this proposition.

Nowhere have condemnees articulated what regulation has been improperly interpreted by which agency. More importantly, the instant case involves a duly enacted statute, not a regulation. Moreover, the statute directs that any party wishing to challenge the Department's determination of damages may do so by filing an application with the Commission. Nowhere is an agency's construction of a statute at issue. What is at issue is the judiciary's construction of Section 2704; clearly, the Supreme Court of Pennsylvania has construed §2704 of the Public Utility Code to require condemnees to petition the Commission to divest itself of jurisdiction prior to having damages determined by the court of common pleas.

As this Court stated in Chevron:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether congress has directly spoken to the precise question at issue. If the intent of congress is clear that is the end of the matter.

Id. at 843, 104 S. Ct. at 2781 (emphasis added). In the instant case the intent of the Pennsylvania legislature is crystal clear. The filing of an application is a condition precedent to the Commission's transfer of jurisdiction to the court of common pleas.

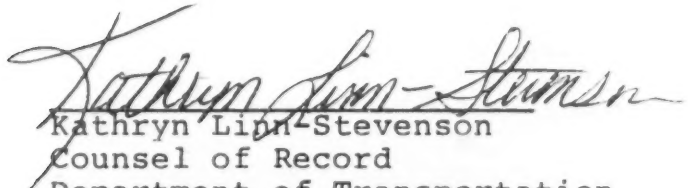
CONCLUSION

Condemnees' petition for writ of certiorari to this Court must be denied as their claims are entirely without merit and have no national or constitutional significance. The

Commission was duly authorized by the Pennsylvania legislature to condemn private property for public use. Furthermore, the Commission was empowered to determine damages, in the first instance, in condemnations involving rail-highway crossings. Condemnees ignored the legislative mandates of Section 2704 of the Public Utility Code by filing their petitions for the appointment of viewers with the Court of Common Pleas of Fayette County without first making application to the Commission to divest itself of jurisdiction. These petitions for the appointment of viewers were void ab initio. Condemnees failed to follow the statutorily prescribed procedures and are now precluded from seeking additional compensation by the six year statute of limitations.

Wherefore, the Department respectfully requests that condemnees' petition for writ of certiorari be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kathryn Linn-Stevenson", written over a horizontal line.

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§5527. Six year limitation.

The following actions and proceedings must be commenced within six years:

(1) An action upon a judgment or decree of any court of the United States or of any state.

(2) An action upon a contract, obligation or liability founded upon a bond, note or other instrument in writing, except an action subject to another limitation specified in this subchapter. Where an instrument is payable upon demand, the time within which an action or proceeding on it must be commenced shall be computed from the later of either demand or any payment of principal or of interest on the instrument.

(3) An action upon any official bond.

(4) A proceeding in inverse condemnation, if property has been injured but no part thereof has been taken, or if the condemnor has made payment in accordance with section 407(a) or (b) (relating to possession and payment of compensation) of the act of June 22, 1964 (Sp.Sess., P.L.84, No. 6), known as the "Eminent Domain Code."

(5) An action to set aside a judicial sale of property.

(6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

1979, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978. As amended 1980, Dec. 5, P.L. 1104, No. 189, § 5, imd. effective.

§1-303. Intent of act; exclusions.

It is intended by this act to provide a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages therefor, except as provided in section 901: Provided, however, that nothing in this act shall be deemed to affect, vary, alter or modify the jurisdiction or power of the Public Utility Commission of the Commonwealth of Pennsylvania, the State Mining Commission created under the act of June 1, 1933 (P.L. 1409), as reenacted and amended, or any act providing for the assessment of benefits for public improvements on the properties benefited. This act is not intended to enlarge or diminish the power of

condemnation given by law to any
condemnor.

1964, Sp.Sess., June 22, P.L. 84, Art.
III, §303.

